MOTION FILED

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No. 84-761

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

DATA GENERAL CORPORATION,
Petitioner,

VS.

DIGIDYNE CORPORATION, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF FOR MERCEDES-BENZ OF NORTH AMERICA, INC. AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DESIGNATION OF CORPORATE RELATIONSHIPS

Amicus curiae Mercedes-Benz of North America, Inc. ("MBNA") is a Delaware corporation and a subsidiary of Daimler-Benz AG, the manufacturer of Mercedes-Benz automobiles. There is no public holding of or market for the stock of MBNA, or the stock of any other United States subsidiary or affiliate of Daimler-Benz AG.

Daimler-Benz AG is an aktiengesellschaft (a "share company") organized under the laws of the Federal Republic of Germany, and it has no parent company. The stock of Daimler-Benz AG is traded on some public exchanges in Europe, but is not traded on any exchange (or, on any regular basis, over-the-counter) in the United States.

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MOTION FOR LEAVE TO FILE BRIEF FOR MERCEDES-BENZ OF NORTH AMERICA, INC., AS AMICUS CURIAE

Pursuant to Rule 36.1, Mercedes-Benz of North America, Inc. ("MBNA") respectfully moves the Court for leave to file the attached brief as *amicus curiae,* in support of the petition of Data General Corporation for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Counsel for petitioner has consented to the filing of the brief *amicus curiae.* The consent of counsel for respondents was requested but refused.

MBNA is a subsidiary of Daimler-Benz AG, the German manufacturer of Mercedes-Benz automobiles and other vehicular products. MBNA distributes Mercedes-Benz automobiles, parts, and accessories in the United States by means of a network of some 400 retail Mercedes-Benz passenger car dealerships, each of which is franchised by MBNA in essentially the same manner as

are the dealerships of all other makes of domestic and foreign automobiles.

Although MBNA's motion is "not favored" under Rule 36.1, it is presented in the belief that the attached brief offers an additional perspective from which to consider the breadth and possible implications of the decision below, per Rule 17, for two essential reasons.

First, this case involves "packaged sales," a facially neutral vertical practice. Here (as often) the practice was adopted by a small seller facing stiff interbrand competition. While not technically a "franchise," the method of distribution selected by petitioner is analogous to scores of franchised distribution systems in which the relative attributes of a "package" of related goods and services represent the very essence of the competitive process. Such arrangements, although perhaps first established and certainly most highly developed in the automotive industry, are today pervasive and serve consumers well. Yet, the decision below may jeopardize all such systems of distribution, for any limiting principles in the *per se* denunciation of package sales are difficult to discern, and are likely to be the subject of recurring controversy and litigation.

In these and many other respects, the present case bears a striking similarity to the famous *Sylvania* litigation, in which this Court's opinion called attention to facts about the automobile business presented in a brief *amicus curiae* of the Motor Vehicle Manufacturers Association. See *Continental TV, Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36, at 37, 54-56 (1977).[1] Here, as in *Sylvania*, an

[1] The decision below is the analog of the panel opinion in *Sylvania*, 1974-1 Trade Cases (CCH) ¶75,072 (9 Cir. 1974). That opinion was vacated, and the judgment reversed, in 537 F.2d 980 (9 Cir. 1976, *en banc*). This Court affirmed, but upon broader grounds, 433 U.S. 36 (1977).

office of the brief *amicus curiae* is to provide information about automotive and similar franchised product distribution systems, so that the decision below may be considered in a broader context than that disclosed by the particular facts of the record in the case at bar.

Second, in a brief *amicus curiae* tendered below, the United States presented views quite similar to those found in its briefs *amicus curiae* filed last term in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 104 S.Ct. 1551 (1984). Those views, however, did not originate in either case. Rather, they were first expressed by the United States in March 1982, on the occasion of its voluntary dismissal of a "tying" case brought against MBNA. There, the government initially objected to MBNA's alleged "package sales" of automobiles and parts to franchised dealers, but later voluntarily dismissed the complaint upon concluding that the challenged arrangement did not harm competition. See *United States v. Mercedes-Benz of North America Inc.*, 517 F.Supp. 1369 (N.D. Calif. 1981; denying motions for summary judgment), and *id.*, 547 F.Supp. 399 (1982; approving voluntary dismissal of the litigation). Familiarity with the distribution systems of MBNA and others, and the facts of the government's case, will provide a second perspective from which to consider the views expressed by the United States in its brief *amicus curiae* below.[2]

Parallel proceedings occurred in *Noble v. McClatchy Newspapers*, 533 F.2d 1081 (9 Cir. 1975), *reh'g denied*, 537 F.2d 1030 (9 Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977).

[2] The reasons for the dismissal of the *Mercedes-Benz* litigation were stated in a public announcement of the Department of Justice, Antitrust Division, printed as an Appendix to the accompanying brief *amicus curiae* of MBNA. Thereby, it may be compared with the brief *amicus curiae* of the United States submitted to the court of appeals below (Appendix E to Petition), which that court unaccountably refused to accept. See Pet., p. 11, note 6.

Also relevant in this respect is a recent decision in a private treble damage action precipitated by the government's case, ***The Mozart Co. v. Mercedes-Benz of North America, Inc.***, unofficially reported in 1984-2 Trade Cases (CCH) ¶66,225 (N.D. Calif. Sept. 18, 1984). So far as we are aware, it is the first and only district court opinion addressing both the decision of the court of appeals below, and ***Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra***. The district court's unsuccessful effort to reconcile the two cases is pertinent to the considerations governing review on certiorari.

CONCLUSION

Presentation of the matters to which we have referred is understandably beyond the spheres of petitioner and respondents here. We believe that, as in *Sylvania,* they may assist the Court by providing a broader basis for evaluation of the important questions raised not only in the petition, but also in the brief of the United States below. MBNA therefore requests leave to present them by way of the brief attached to this motion.

Dated: San Francisco, California
December 6, 1984

Respectfully submitted,

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This brief *amicus curiae* is presented in support of the petition of Data General Corporation for a writ of certiorari to review the judgment of the court of appeals in this cause, reported at 734 F.2d 1336 (9 Cir. 1984). It is accompanied by a motion for leave to file, per Rule 36.1, inasmuch as petitioner has given its consent to the filing of this brief, but respondents have declined to give their consent.

DESCRIPTION AND INTEREST OF AMICUS CURIAE

Mercedes-Benz of North America, Inc. ("MBNA") is a Delaware corporation formed in 1965, and is a wholly owned subsidiary of Germany's Daimler-Benz AG, the world's oldest automobile manufacturer. MBNA distributes Mercedes-Benz automobiles, parts, and accessories to the United States motoring public, by means of a network of some 400 retail Mercedes-Benz passenger car dealerships franchised by MBNA.

About twenty other imported car companies similarly attend to the United States distribution of the products of European and Japanese automakers; for present purposes, the imported car companies are indistinguishable from General Motors, Ford, and Chrysler. All auto companies use the franchised-dealer method of distribution of their products, and all auto companies are treated as "manufacturers" for most purposes of law, such as emission and safety regulations, product liability and warranty obligations, and the multitude of federal and state "automobile dealer protection" statutes. For these essential reasons, the automobile business is but one example of a franchised method of distribution through which occurs so much of the interbrand competition spoken of in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-57 (1977; hereafter "*Sylvania*").

Indeed, the franchised distribution of automobiles was a subject of reference in *Sylvania's* economic analysis of the relationships among manufacturers, dealers, and consumers, and that of the role played by non-price vertical restraints in the promotion of interbrand competition. Background for the Court's examination of these subjects was provided in part by the brief *amicus curiae* submitted

in *Sylvania* by the Motor Vehicle Manufacturers Association. See *Sylvania,* 433 U.S. at 37, 54-56. MBNA's interest here, and the office of this brief, are therefore essentially the same as those of *amicus curiae* in *Sylvania.*

In addition, the United States presented a brief *amicus curiae* to the court below in this case, reprinted as Appendix E to the petition here. The views expressed by the government are essentially those that it first stated in 1982, when it dismissed a "tying" case brought in 1979 against MBNA, *United States v. Mercedes-Benz of North America, Inc.*, N.D. Calif. Civil No. C-79-2144-MHP.[1] The announcement issued by the United States on that occasion is reprinted as an Appendix to this brief, *post.* The views of the United States are, we believe, important to the consideration of the petition here; if so, then the Court should be familiar with the *Mercedes-Benz* litigation as an illustration of the views of the government brought to bear in a particular case.

REASONS FOR GRANTING THE WRIT, AND SUMMARY OF ARGUMENT

At page 10 of its petition, Data General states:

> This case affects all markets, not just computers. In and out of the computer business, firms strive to create novel solutions to old problems. Precisely because people have different needs and desires, product differentiation is the order of the day. Firms compete to design products that solve one of these needs a little better than the rest. They offer their products in competition with other methods—each a little different—of serving the same needs. *Some*

[1] See, generally, the two reported decisions in that litigation, *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369 (N.D. Calif. 1981), and *id.*, 547 F.Supp. 399 (1982).

customers will find one of these methods best, and they will purchase the product. They will testify that they bought the product because it was a little better (for their needs) than anything else. The Ninth Circuit would then find the purchase to be evidence of uniqueness, and uniqueness precludes tying.

The office of this brief is to demonstrate the soundness of petitioner's submission, and to do so from the perspective of MBNA and the many other firms that employ the franchised-dealer method of providing their products and services to consumers.

Proper antitrust analysis of vertical, non-price marketing arrangements begins with *Sylvania*, which calls attention to interbrand competition, and to the respective roles and relationships of manufacturers, dealers, and consumers in that competitive setting. Where franchises are employed, the franchisor typically offers a "package" of related goods and services, believing that (1) the package of offerings will attract capable retailer-franchisees, and (2) retailers that sell the manufacturer's entire line of related products and services will attract customers, thereby promoting interbrand competition.

Although *Sylvania* dealt with one species of vertical arrangement, the economic analysis of that decision should not be confined to the particular facts of that case.[2] Thus, in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, ... U.S. ... 104 S.Ct. 1551 (1984),[3] an economic analysis similar to that of *Sylvania* led to the conclusion that "packaged sales" do not, without more, pose any threat to the competitive process. Similar analysis led to the same essential finding in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977; hereafter "*Fortner II*").

The court of appeals below, however, ignored the teachings of all three decisions of this Court. It consigned virtually all "packaged sales" to the category of a *per se* tying offense, and did so without ever even attempting the kind of economic analysis required by *Sylvania* and *Hyde*. Then, it compounded that mistake by equating "differences" among competitive products with the "market power" spoken of in *Fortner II*, without ever analyzing whether those perceived "differences" conferred upon petitioner any real "advantage not shared by his competitors in the market for the tying product." *Fortner II*, 429 U.S. at 620.

If, as we suggest, the decision below is a heresy, it should be rooted out before it spreads to the field of franchised product distribution systems. Every franchisor offers a package, each a little different from those of others in the field. Thereby, the facts universally present in all such distribution systems would become grist for the mill of antitrust litigation, all as may be seen from the vantage-point of the government's 1979 case initiated against MBNA.

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[2] As one commentator has observed, R. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U.Chi.L.Rev. 1, 11-12 (1977):

> Some tie-ins are imposed by monopolists as a method of price discrimination, but tie-ins imposed by franchisors who are in competition with other sellers of the same product, just as Schwinn and Sylvania are in competition with other sellers of bicycles and television sets, are not of this kind. Franchise tie-ins are methods not of discriminating or otherwise exploiting or extending monopoly power but of promoting interbrand competition by assuring quality control and product and service uniformity. This redeeming virtue should be enough under the principles of *Sylvania* to remove the franchise tie-in from the category of practices that are illegal per se.

[3] Hereafter cited as "*Hyde*, 104 S.Ct. at ... "

ARGUMENT

1. Background: The Automobile Business

There are about twenty-five domestic manufacturers and importers selling passenger cars in the United States. Americans buy over nine million cars a year, of which General Motors sells over four million, Ford a million-and-a-half, Chrysler about 850,000, Toyota and Nissan (Datsun) over 500,000 each, and Mercedes-Benz fewer than 70,000 (0.8%). All automobiles are retailed under the franchise system. There are over 20,000 retail automobile dealerships in the United States, of which only about 400 (2%) are Mercedes-Benz dealerships.

Automobile dealers pay nothing to their franchisors for the dealerships they hold, but each agrees to conduct business in accordance with the franchisor's requirements; the manufacturer or importer undertakes to provide marketing, sales, and management aids and assistance, consumer warranties, extensive technical assistance and training, and substantial advertising. With very few exceptions, all such services and support are provided to dealers without charge.

This franchise system has come to include some universal elements. All dealer franchises require the dealer to display the franchisor's trademarks, to employ factory-trained technicians, to use the manufacturer's sales materials, even to observe certain business hours; and all of them require the dealer to maintain a "factory authorized service department," and a stock of trademarked replacement parts both for use in the service department and for sale to independent repair shops and to the public. Both dealer and franchisor expect and intend to convey to the public the message that this dealer is this factory's representative in this locality.

Thus, among the subjects thoroughly covered by all automobile dealer agreements are those of service, repair, and parts. Car makers and car dealers have long horizons. Their objective is not to sell one car to one customer today; their objective is to wed the customer to their brand of automobile, and this is why service and repair are vital to the automobile business. The availability and quality of such services affect a manufacturer's good will and the competitiveness of its products, *Sylvania, supra,* 433 U.S. at 55. And so the franchise agreement requires the dealer to provide them, in accordance with the manufacturer's standards, for both warranty and non-warranty work.

Every new-car buyer receives a manufacturer's warranty, providing that within the warranty period, the owner may take the car to a franchised dealer, where service and repair are "factory authorized." The dealer is also required to offer non-warranty repair and service, because these are vital to the franchisor's good will, and there is no way the manufacturer can economically provide them except through a network of authorized dealers. The new-car warranty has been much broadened in time and mileage over the years, but even apart from that, seller and buyer alike understand that their relationship is from the outset more than transient and episodic. Both know that the car will have to be brought in periodically for inspection and service; and by and large, the customer who brings the car in in the morning expects to drive it out again that evening. To accomplish this requires an adequate facility, a staff of competent people, a stock of those replacement parts which are in daily demand, and fast access to a stock of parts for which demand is not so great.

In every dealer service department, the franchisor's trademark is prominently displayed, "genuine parts" are advertised, and parts and service representatives wear uniforms with the trademark on them. Again, the mutual intention is to convey the message that this is an "authorized dealer," who services and repairs the cars he sells to "factory standards" through "factory-trained technicians" using "genuine parts." They nurture the public image that the dealer is the manufacturer's representative, and those who come to him for new cars, or service, or repairs, will get the real thing. For example, it is by no means an overstatement to suggest that this message is conveyed to the public by the redoubtable "Mr. Goodwrench," and not merely as to the products of General Motors, but equally as to the respective products of all other automobile companies.

Arrangements like this, although perhaps first established and certainly most highly developed in the automobile industry, pervade American business today, and are perfectly lawful, e.g., *California Glazed Prods. v. Burns & Russell Co.,* 708 F.2d 1423, 1425 (9 Cir.), *cert. denied,* 104 S.Ct. 348 (1983). In a sense and a measure, such arrangements "restrain" the conduct of each party to the dealer franchise agreement; but all contracts do that, and are none the worse for it. Such restraints as inhere in distribution franchise arrangements are not designed to and do not work against the interest of the consuming public. Instead, they facilitate consumers' choices and fulfill consumer expectations, which could easily be frustrated if the manufacturer were unable to require the dealer to uphold the franchisor's good will and competitiveness by offering products, services, and repairs that meet the manufacturer's standards.

Indeed, all franchise arrangements—whether denominated "tying" or "exclusive dealing" contracts—that limit the range of products or services offered by

franchised dealers play a role in the promotion of interbrand competition. As Justice Jackson observed in his dissenting opinion in *Standard Oil Co. of California v. United States,* 337 U.S. 293, at 323 (1949):

> Many contracts have the effect of taking a purchaser out of the market for goods he already has bought or contracted to take. But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. It means to me, if I must decide without evidence, that these contracts are an almost necessary means to maintain this all-important competition for consumer business, in which it is admitted competition is keen. The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged.

Such arrangements also assure that consumers will, in fact, receive the goods of the franchisor whose trademark is displayed by its franchisees. If the manufacturer-franchisor were unable to impose a limit upon the kinds of products sold by franchisees, the result would be "palming off" by retailers under what would amount to the "compulsory license" of a manufacturer-franchisor's trademark, e.g., *Krehl v. Baskin-Robbins Ice Cream Co.,* 664 F.2d 1348, 1354 (9 Cir. 1982); *Jack Walters & Sons Corp. v. Morton Buildings, Inc.,* 737 F.2d 698, 704 (7 Cir.), *cert. denied,* . . . U.S. . . . (No. 84-405, Nov. 13, 1984). [4]

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[4] Other vertical "restraints," familiar in the automotive industry, are widely emulated in other businesses. These include locations clauses, *Sylvania, supra;* requirements as to cooperative advertising, *Miller Motors v. Ford Motor Co.,* 149 F.Supp. 790 (M.D.N.C. 1957), *aff'd,* 252 F.2d 441 (4 Cir. 1958); and requirements or exhortations to carry a

2. The Decision Below, in the Light of Sylvania, Hyde, and Fortner II

Petitioner here is a small seller that selected "packaged sales" as its response to stiff interbrand competition in its industry. Although petitioner's chosen method of marketing its products did not involve "franchises" as such, it was analogous in purpose and effect to those of most franchisors, for, as one court has observed, "the very essence of a franchise is the purchase of several related products in a single, competitively attractive package."[5]

Another way of phrasing the same essential idea is this: "Buyers often find packaged sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—conduct that is entirely consistent with the Sherman Act." *Hyde, supra*, 104 S.Ct. at 1558. When laid alongside *Sylvania*, the net of *Hyde* appears to be this: A departure from the rule of reason standard ("the traditional framework of analysis under §1 of the Sherman Act," *Sylvania*, 433 U.S. at 49), must be based upon record evidence that a particular arrangement is so lacking in redeeming economic value as to warrant invocation of a *per se* rule of condemnation. In order to reach such a conclusion, a court must undertake what might be called a "pre-*per se*" analysis of economic facts.

The court below, however, simply assumed that the case before it was a *per se* case, and by that *ipse dixit*, it concluded that economic analysis of actual competitive

manufacturer's full line of competitive product offerings, *Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5 Cir.), *cert. denied*, 454 U.S. 860 (1981).

[5] *Phillips v. Crown Central Petroleum Co.*, 602 F.2d 616, 628 (4 Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

conditions "is inappropriate in a *per se* case." (App. A to Pet., at p. 19a). That stands the law on its head; *Hyde* teaches that economic analysis of the marketplace in which packaged sales occur must be undertaken, and it must be undertaken *before* the arrangement can be characterized as an unreasonable restraint, *per se* or at all.[6]

That is why we suggest that the present case bears so much similarity to *Sylvania*. The "pre-*per se*" inquiry required by *Hyde* is really quite similar to what *Sylvania* had already introduced to the law of vertical non-price restraints. As one court recently observed, *Jack Walters & Sons Corp v. Morton Bldg., Inc., supra,* 737 F.2d at 702:

> "A charge that limiting the territories in which one's dealers can sell violates section 1 of the Sherman Act is now evaluated under the Rule of Reason. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). This means among other things that the plaintiff must show that the defendant has market power, see *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982), as this is a prerequisite to being able to restrain trade unreasonably. The Supreme Court's most recent tying decision requires the plaintiff to make a similar, maybe identical, showing in order to prove that a tying arrangement is unlawful, even though tying still is referred to as a per se offense. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, . . . U.S. . . . , 104 S.Ct. 1551, 1559-60, 80 L.Ed.2d 2 (1984)."

[6] This appears to be the unanimous view of the members of this Court in *Hyde*. The "pre-*per se*" analysis presented in the opinion of the Court (per Justice Stevens) was simply an effort to determine whether the results of the challenged arrangement were beneficial, neutral, or pernicious from an economic point of view. Thus, the particular arrangement in *Hyde* was held not to qualify for *per se* treatment, after the required economic analysis had been performed.

After eschewing proper analysis of market conditions, per *Sylvania* and *Hyde,* the court of appeals compounded its mistake when it undertook to distinguish *Fortner II.* "Money is fungible," said the court below (App. A to Pet., p. 17a), but that truism is of no moment except as it discloses that the court thought *Fortner II* to be a decision limited to its own particular facts. *Fortner II,* however, is not so easily discarded. Twice in its opinion, this Court said that differences among competitive offerings are relevant only where they disclose that one seller possessed a distinct *and* unassailable advantage over its rivals—where "competitors are in some way *prevented* from offering the distinct products themselves" (*Fortner II,* 429 U.S. at 621), leading to the conclusion that other sellers could not offer a similar product "*if they so elected*" (*id.*, at 622).

But product differentiation is the essence of competition in many fields of business; each producer strives to offer a product somewhat different than those of others, and the fact that a host of differentiated products is offered and sold in the marketplace simply attests to differences among needs and perceptions of consumers. A Cadillac is neither a Chevrolet, a Ford, nor a Mercedes-Benz, but by addressing differences of degree, rather than kind, the court below effectively held that each product is "unique," and thereby confers upon its seller "market power" in a *Fortner II* sense.

Prior to *Hyde,* some lower courts rejected the presumption that successful conditioning necessarily resulted in the "forced" sale of a product the customer would have preferred to have purchased elsewhere. These courts refused to presume after *Fortner II* that the purchase of two products, offered only in tandem, was the result of the exploitation of power possessed by the seller in one of the two product markets. For example, in *Phillips v. Crown Central Petroleum Co., supra,* the Fourth Circuit held that

the superior bargaining position sometimes enjoyed by franchisors *vis-a-vis* their franchisees is not market power, and thus cannot usually be exploited to anticompetitive ends. That court in effect held that substantial acceptance by franchisees of terms thought to be "burdensome" is explained by the very existence of the franchise, and does not suggest the presence of anticompetitive forcing. And franchisors like MBNA viewed *Hyde* as confirming that a conditional purchase no longer carries a presumption that it is a forced purchase resulting from the exploitation of market power.

The decision below is at odds not only with *Hyde*, but also with the trend in lower court decisions initiated by *Fortner II.* It assumes the existence of power in the market for the tying product by reason of product differentiation, and assumes that the power was used because it also assumes that the package requirement was burdensome. The decision suggests that two complementary products may not legally be offered for sale only as a package where at least one of the products is differentiated. It therefore raises a conflict between the Fourth and Ninth Circuits, and threatens to pose a substantial impediment to the franchise method of distribution.

3. A Case Study: United States v. Mercedes-Benz of North America

In its brief *amicus curiae* tendered to the court below, the United States said (App. E. to Pet., p. 117a):

> "Unless rehearing is granted, the panel decision could be invoked in other cases to condemn as a *per se* illegal tying arrangement a packaged sale that in fact is pro-competitive or is competitively neutral. While we take no position on whether the packaged sale at issue in this case violates the Sherman Act, the panel's misinterpretation of *Hyde* warrants rehearing by this Court."

While it took "no position" below, the United States *has* taken a position in another case, *United States v. Mercedes-Benz of North America, Inc.*,[7] and a brief recitation of the proceedings there may be helpful to an understanding of the government's statement about the panel opinion being invoked improperly "in other cases."

In its 1979 civil complaint, the first "tying" case of any moment brought by the government since *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), the United States alleged that MBNA required Mercedes-Benz dealers to purchase repair parts for Mercedes-Benz automobiles exclusively from it.[8] Since dealers of necessity purchase substantial quantities of repair parts from their respective franchisors (about 70% of their needs, in the case of Mercedes-Benz dealers) and since MBNA is obviously the only seller of Mercedes-Benz automobiles, the facts universally present in automobile dealerships everywhere led to the charge that MBNA had unlawfully "tied" the purchase of parts to the purchase of automobiles.

The United States obviously could not show that MBNA, seller of less than 1% of all automobiles purchased in the United States, and franchisor of only 2% of the nation's 20,000 dealers, had a "dominant" market share necessary to support a *per se* disposition of the case. Therefore, the United States initially proceeded under

[7] Civil Action No. C-79-2144-MHP, Northern District of California. Two decisions of that court are reported in 517 F.Supp. 1369 (1981, denying summary judgment motions), and 547 F.Supp. 399 (1982, approving the government's voluntary dismissal of the case).

[8] The government did not challenge the arrangement insofar as it applied to parts used for repairs made under warranty, and did not assert that MBNA in any way interfered with dealers' purchases of parts for use on other makes of automobiles. *Cf., Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7 Cir. 1935), *aff'd mem.*, 299 U.S. 3 (1936).

Fortner II, arguing that the "differences" between Mercedes-Benz automobiles and those of other makes warranted a finding that Mercedes-Benz automobiles were "unique" in the sense used in *Fortner II*. The district court disagreed; it denied the government's motion for a summary judgment, with comments suggesting that the government's case on "economic power" was rather thin. *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369, 1384-88 (N.D. Cal. 1981).

After considering the district court's opinion for several months, the United States took a voluntary nonsuit, dismissing the complaint per F.R.Civ.P. Rule 41(a) on March 15, 1982.[9] In a contemporaneous press release, the United States stated in part:

> Assistant Attorney General Baxter, in charge of the Antitrust Division, said he had decided to dismiss the case because he had concluded, after a through review of the case, that the 'tying' arrangement involved did not have anticompetitive effects in the luxury passenger car market.
>
> Mr. Baxter said that tying arrangements of the sort involved in this case do not harm competition by creating market power but merely allow firms to capture, in a particular way, the value of customer preference for the particular brand or trade name. "Were the arrangement to be prohibited," Baxter said, "the manufacturer could, and probably would, capture the value of that preference in another way—here, perhaps by increasing the initial

[9] The district court then held hearings, determined that the Tunney Act was inapplicable to voluntary dismissal, and approved the dismissal of the action by the United States in 547 F.Supp. 399 (N.D. Cal. 1982).

purchase price and reducing parts prices, a rearrangement unlikely to yield any economic benefits."[10]

This statement of the United States illustrates the capacity for mischief lurking in the decision of the court of appeals here. If, per *Hyde*, "buyers often find packaged sales attractive"(104 S.Ct. at 1558), it does not follow that a seller's decision to offer its products or services in a "package" or "bundle" reflects "anticompetitive forcing," but the decision below accepts the contrary proposition as gospel. What is worse, it then seizes upon the very attributes of the "package" that differentiate it from the offerings of other sellers, and equates those attributes with "market power." Each competitive offering is different, and each is thereby "unique" under *Fortner II*.

The problems created by the decision below recently came to the fore in *The Mozart Co. v. Mercedes-Benz of North America, Inc.*, 1984-2 Trade Cases (CC) ¶66,225 (N.D. Calif. Sept. 18, 1984), a private triple-damage case precipitated by *United States v. Mercedes-Benz, supra*. There, plaintiff presented essentially the same "economic power" facts and arguments to the same district court judge whose opinion in the *United States* case (517 F.Supp. at 1384-88) cast doubt upon the validity of the government's showing. Although the district court again denied summary judgment, it seemed to view the new plaintiff's identical showing in a more favorable light, largely because of the intervening decision of the court of appeals in the *Data General* case now at bar. See 1984-2 Trade Cases ¶ 66,255, at CCH pages 69,941 through 66,943.[11]

[10] The full text of the press release is printed as an Appendix to this brief, *post*. Similar expressions of view may be found in the government's brief *amicus curiae* in *Hyde*.

[11] *Cf.*, also, *Metrix Warehouse, Inc. v. Daimler-Benz AG and Mercedes-Benz of North America*, 1984-1 Trade Cases (CCH) ¶ 65,766 (D.Md. 1983), *vacated*, 1984-2 Trade Cases (CCH) ¶ 66,226 (D.Md. 1984).

This is only to illustrate that the decision below, like the first panel decision of the court of appeals in *Sylvania*,[12] has the potential to create serious and widespread controversy and uncertainty, within the Ninth Circuit and elsewhere. Being at loggerheads with controlling decisions of this Court, as well as those of other courts of appeals, it fully merits the issuance of a writ under the familiar principles governing certiorari jurisdiction.

[12] The panel opinion of the court of appeals in *Sylvania* is unofficially reported in 1974-1 Trade Cases (CCH) ¶ 75,072 (9 Cir. 1974). That decision was vacated, and the judgment reversed, in 537 F.2d 980 (9 Cir. 1976, *en banc*), *aff'd*, 433 U.S. 36 (1977).

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment below reversed.

Dated: San Francisco, California
December 6, 1984

Respectfully submitted,

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Appendix

Department of Justice

FOR IMMEDIATE RELEASE AT

MONDAY, MARCH 15, 1982 202-633-2007

The Department of Justice today dismissed without prejudice a civil antitrust suit against Mercedes-Benz of North America, Inc. (MBNA), of Montvale, New Jersey, the exclusive distributor of Mercedes-Benz automobiles in the United States.

MBNA is a wholly owned subsidiary of Daimler-Benz, A.G., the West German company that manufactures the cars.

The complaint, filed August 15, 1979, in the U.S. District Court in San Francisco, alleged that MBNA conditioned the sale of Mercedes-Benz automobiles to its dealers on the dealers' purchase of replacement parts from MBNA, in violation of Section 1 of the Sherman Act.

Assistant Attorney General William F. Baxter, in charge of the Antitrust Division, said he had concluded, after a thorough review of the case, that the "tying" arrangement involved did not have anti-competitive effects in the luxury passenger car market.

Baxter said that tying arrangements of the sort involved in this case do not harm competition by creating market power. Instead, they merely allow firms to capture, in a particular way, the value of customer preference for the particular brand or trade name, he said.

"Were the arrangement to be prohibited," Baxter said, "the manufacturer could, and probably would, capture the value of that preference in another way—here, perhaps, by increasing the initial purchase price and reducing parts prices, a rearrangement unlikely to yield any economic bemefits. To the extent existing market power presents a competitive problem, other sections of the antitrust statues could be used to attack directly such market power."

Baxter also said pretrial rulings in the case left the goverment in a posture in which it would have tc prove at trial that MBNA has sufficient market power in the overall merket in which the "tying" product, Mercedes-Benz passenger cars, competes, to restrain competition in the "tied' product, replacement parts for those cars.

Also remaining open for trial was the question of whether MBNA has a business justification, namely, quality control, for the tying arrangement.

Litigation of those issues would consume resources of the Department of Justice that can be shifted to other matters far more likely to yield competitive benefits to consumers, Baxter said.